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8 DAVID BENNETT,
9 Plaintiff,
10 v.
11 PROP. 47 PUBLIC DEFENDER, et al.,
12 Defendants.
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18 UNITED STATES DISTRICT COURT
19 NORTHERN DISTRICT OF CALIFORNIA
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21 Case No. 19-08166 BLF (PR)
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23 **ORDER GRANTING MOTION FOR
RECONSIDERATION; REOPENING
ACTION; DIRECTING PLAINTIFF
TO FILE AMENDED COMPLAINT
REVOKING E-FILE STATUS;
DENYING MOTION FOR
APPOINTMENT OF COUNSEL**
24

25 (Docket No. 11)
26

27 Plaintiff, a state parolee at the time he filed this action, filed the instant *pro se* civil
28 rights action pursuant to 42 U.S.C. § 1983 against the Public Defenders Lara Wallem and
Maried O'Keefe of the "Public Defenders for Prop 47 Department," and the Sixth District
Appellate Program ("SDAP"). Dkt No. 1 at 1. On June 10, 2020, the Court dismissed the
complaint with leave to amend. Dkt. No. 7. In the same order, Plaintiff was granted leave
to proceed *in forma pauperis* and permission for electronic filing. *Id.* On July 24, 2020,
the Court dismissed the complaint for Plaintiff's failure to file an amended complaint in
the time provided and entered judgment the same day. Dkt. Nos. 9, 10.

29 On August 11, 2020, Plaintiff filed a "motion for extension of time and
30 reconsideration and preliminary injunction and temporary restraining order due to covid-19
31 conditions and motion for counsel." Dkt. No. 11 at 1. The Court addresses each of these
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1 motions below.

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3 DISCUSSION

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A. Motion for Extension of Time and Reconsideration

5 At the time he filed this action, Plaintiff was out on parole. Dkt. No. 1. Plaintiff
6 states that on April 5, 2020, he was arrested and placed in Butte County Jail. Dkt. No. 11
7 at 1. On May 29, 2020, he filed a notice of change of address to Butte County Jail. Dkt.
8 No. 8. Plaintiff asserts that the court order should have been sent to his Butte County
9 address, and now requests reconsideration of the dismissal and more time to amend the
10 complaint. *Id.* Since the change of address was filed before the Court issued the initial
11 review order, there is no reason to believe that the order was not sent to the current address
12 provided by Plaintiff. Nevertheless, in the interest of justice, the Court will assume that a
13 clerical error delayed Plaintiff's receipt of the Court's Order of Dismissal with Leave,
14 causing Plaintiff to miss the deadline. Accordingly, his motion for reconsideration is
15 GRANTED. The Clerk shall be directed to vacate the judgment and reopen this action.
16 Plaintiff's request for an extension of time is also GRANTED. Plaintiff shall file an
17 amended complaint in the time provided at the end of this order.

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B. Motion for Preliminary Injunction and Temporary Restraining Order

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20 Plaintiff seeks injunctive relief against Butte County Jail based on COVID-19
21 related hardships. Dkt. No. 11 at 2-6. However, these are new claims against new
22 Defendants which are unrelated to the underlying claims in this action which is based on a
23 claim for damages based on an allegedly unconstitutional conviction. Dkt. No. 9 at 2-4.
24 The Court advised that Plaintiff's claim for damages may be barred by *Heck v. Humphrey*,
25 512 U.S. 477 (1994), and that Plaintiff must provide proof that the challenged conviction
26 has been invalidated and that he must also name the proper Defendant. *Id.* at 4.
27 Accordingly, that damage claim related to an unconstitutional conviction is the only claim
28 that the Court will entertain in this action. If Plaintiff wants relief from conditions at Butte

1 County Jail, he must file a separate action and be subject to those filing fees. Accordingly,
2 the motion for preliminary injunction and temporary restraining order is DENIED.

3 **C. Electronic Filing Status**

4 In light of the fact that Plaintiff is now in custody, the Court revokes his e-file
5 status. The Clerk shall remove the e-filing designation on this case. Plaintiff shall be
6 served paper copies of all filings in this matter.

7 **D. Motion for Appointment of Counsel**

8 Plaintiff seeks appointment of counsel because of his alleged incompetency and
9 ongoing mental health proceedings. Dkt. No. 11 at 7.

10 **1. Appointment of Counsel under 28 U.S.C. § 1915**

11 There is no constitutional right to counsel in a civil case unless an indigent litigant
12 may lose his physical liberty if he loses the litigation. *See Lassiter v. Dep’t of Social
13 Services*, 452 U.S. 18, 25 (1981); *Rand v. Rowland*, 113 F.3d 1520, 1525 (9th Cir. 1997)
14 (no constitutional right to counsel in § 1983 action), *withdrawn in part on other grounds
15 on reh’g en banc*, 154 F.3d 952 (9th Cir. 1998) (en banc). However, a court “may request
16 an attorney to represent any person unable to afford counsel.” 28 U.S.C. § 1915(e)(1).
17 The decision to request counsel to represent an indigent litigant under § 1915 is within “the
18 sound discretion of the trial court and is granted only in exceptional circumstances.”
19 *Franklin v. Murphy*, 745 F.2d 1221, 1236 (9th Cir. 1984). A finding of the “exceptional
20 circumstances” of the plaintiff seeking assistance requires an evaluation of the likelihood
21 of the plaintiff’s success on the merits and an evaluation of the plaintiff’s ability to
22 articulate his claims pro se in light of the complexity of the legal issues involved. *See
23 Agyeman v. Corrections Corp. of America*, 390 F.3d 1101, 1103 (9th Cir. 2004); *Rand*, 113
24 F.3d at 1525; *Terrell v. Brewer*, 935 F.2d 1015, 1017 (9th Cir. 1991); *Wilborn v.
25 Escalderon*, 789 F.2d 1328, 1331 (9th Cir. 1986). Both of these factors must be viewed
26 together before reaching a decision on a request for counsel under § 1915. *See id.*

27 Generally, a plaintiff that shows at least some ability to articulate his claims is not

1 entitled to appointment of counsel, regardless of whether he has mental and physical health
2 problems or is incarcerated. *See, e.g., Warren v. Harrison*, 244 Fed. Appx. 831, 832 (9th
3 Cir. 2007) (holding that an inmate plaintiff who had alleged mental illness did not qualify
4 for appointment of counsel because he competently presented his claims and attached three
5 pertinent exhibits); *Miller v. McDaniel*, 124 Fed. Appx. 488, 490 (9th Cir. 2005) (holding
6 that an inmate plaintiff with mental health problems was not entitled to appointment of
7 counsel because he demonstrated an ability to articulate his claims pro se); *Palmer v.*
8 *Valdez*, 560 F.3d 965, 970 (2009) (holding that an inmate plaintiff who was suffering pain
9 from a surgery and had limited access to legal documents did not require appointment of
10 counsel because he did a good job presenting his case, was well organized, made clear
11 points, and presented evidence effectively). Here, as in the cases cited above, Plaintiff has
12 shown an ability to articulate his claims in spite of his alleged mental health issues:
13 Plaintiff seeks damages for an allegedly unconstitutional conviction. *See supra* at 2.
14 Furthermore, the issues presented are not particularly complex. Accordingly, Plaintiff's
15 request for appointment of counsel is DENIED without prejudice for lack of exceptional
16 circumstances. *See Agyeman*, 390 F.3d at 1103; *Rand*, 113 F.3d at 1525; *Terrell*, 935 F.2d
17 at 1017; *Wilborn*, 789 F.2d at 1331.

18 **2. Appointment of Guardian Ad Litem under Fed. R. Civ. P. 17(c)**

19 Based on his assertion of mental health issues, the Court will also consider whether
20 Plaintiff warrants appointment of a guardian ad litem under Federal Rule of Civil
21 Procedure 17(c), which provides in relevant part that:

22 A minor or an incompetent person who does not have a duly appointed
23 representative may sue by a next friend or by a guardian ad litem. The
24 court must appoint a guardian ad litem – or issue another appropriate order
25 – to protect a minor or incompetent person who is unrepresented in an
action.

26 Fed. R. Civ. P. 17(c)(2). The Ninth Circuit has held that when “a substantial question”
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1 exists regarding the mental incompetence of a pro se litigant, the district court should
2 conduct a hearing to determine competence so that a guardian ad litem may be appointed if
3 appropriate. *Allen v. Calderon*, 408 F.3d 1150, 1153 (9th Cir. 2005); *Krain v. Smallwood*,
4 880 F.2d 1119, 1121 (9th Cir. 1989). Other circuits have held that a district court's duty of
5 inquiry under Rule 17(c) is triggered by "verifiable evidence" of incompetence. *See, e.g.*,
6 *Powell v. Symons*, 680 F.3d 301, 307 (3rd Cir. 2012); *Ferrelli v. River Manor Health Care*
7 *Center*, 323 F.3d 196, 203 (2d Cir. 2003).

8 The Ninth Circuit found a "substantial question" regarding competence where a pro
9 se prisoner litigant submitted a letter from the prison psychiatrist stating that the litigant
10 was under his care, had been diagnosed with schizophrenia, and was taking psychotropic
11 medications, *see Allen*, 408 F.3d at 1152, but it found no substantial question where a pro
12 se litigant merely asserted that the district court should have conducted a competency
13 hearing, *see Day v. Sonoma Cnty.*, 1997 WL 686016, at *2 (9th Cir. Oct. 30, 1997). The
14 Third Circuit found "verifiable evidence" of incompetence where one co-plaintiff was
15 adjudicated incompetent in a simultaneous criminal proceeding and the other co-plaintiff
16 submitted a letter from a mental health professional. *See Powell*, 680 F.3d at 308-09. The
17 Second Circuit has indicated that "verifiable evidence" could take the form of records from
18 a court or public agency or evidence from a mental health professional, but that bizarre
19 behavior, standing alone, is not sufficient to trigger a district court's duty of inquiry under
20 Rule 17(c). *See Ferrelli*, 323 F.3d at 201-02.

21 In this case, Plaintiff submits no evidence of incompetence. Rather, he merely
22 asserts that he is currently undergoing mental health proceedings, not that he has been
23 found incompetent. As discussed above, Plaintiff has shown an ability to articulate his
24 claims despite his mental health issues. *See supra* at 4. Furthermore, Plaintiff provides no
25 letter from a mental health professional or other "verifiable evidence" of his incompetence
26 to trigger this Court's duty of inquiry. *See Ferrelli*, 323 F.3d at 201-02. Plaintiff's mere
27 assertion that he needs the assistance of counsel to proceed with the case, without more, is

1 not sufficient to raise a substantial question. *See, e.g., Day*, 1997 WL 686016, at *2.
2 Accordingly, the Court finds that in the absence of verifiable evidence of incompetence,
3 there is no substantial question regarding Plaintiff's competence and therefore no duty of
4 inquiry. *See Allen*, 408 F.3d at 1152; *Ferrelli*, 323 F.3d at 201-02. Plaintiff does not
5 warrant appointment of a guardian ad litem under Rule 17(c).

6

7 CONCLUSION

8 For the reasons state above, the Court orders as follows:

9 1. Plaintiff's motion for reconsideration is **GRANTED**. Judgment is hereby
10 **VACATED**. Dkt. No. 10. The Clerk shall reopen this action.

11 2. Plaintiff's request for an extension of time to file an amended complaint is
12 **GRANTED**. Within **twenty-eight (28) days** from the date this order is filed, Plaintiff
13 shall file an amended complaint using the court's form complaint to attempt to remedy the
14 deficiencies discussed in the Court's Order of Dismissal with Leave to Amend. Dkt. No.
15 7. The amended complaint must include the caption and civil case number used in this
16 order, i.e., Case No. C 19-08166 BLF (PR), and the words "**AMENDED COMPLAINT**"
17 on the first page. Plaintiff must answer all the questions on the form in order for the action
18 to proceed. Plaintiff is reminded that the amended complaint supersedes the original, and
19 Plaintiff may not make references to the original complaint. Claims not included in the
20 amended complaint are no longer claims and defendants not named in an amended
21 complaint are no longer defendants. *See Ferdik v. Bonzelet*, 963 F.2d 1258, 1262 (9th
22 Cir.1992).

23 **Failure to respond in accordance with this order by filing an amended
24 complaint in accordance with the above in the time provided will result in the
25 dismissal of this action without prejudice and without further notice to Plaintiff.**

26 3. Plaintiff's e-filing status is **REVOKED**. Plaintiff shall no longer be treated
27 as an e-filing litigant. Hereinafter, paper copies of all court orders shall be served on

1 Plaintiff, including this order.

2 4. Plaintiff's motion for appointment of counsel is **DENIED** without prejudice
3 for lack of exceptional circumstances.

4 This order terminates Docket No. 11.

5 **IT IS SO ORDERED.**

6 Dated: September 2, 2020


BETH LABSON FREEMAN
United States District Judge

United States District Court
Northern District of California

25 Order Granting Recon; Reopening; EOT to file Am.Compl.
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